

COVID-19 in Brazil: A Sick Constitutional Democracy

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2021-02-22T11:00:57

Legal and Political Responses in Brazil to COVID-19

In the first half of January 2021, Brazil had already counted more than 200,000 deaths and 8 million people diagnosed with COVID-19. Throughout 2020, the responses from the federal government, which should have taken on a coordination role considering the federalised National Health Service (*SUS, Sistema Único de Saúde*), were confusing and inefficient. Doubts and scepticism spread by the federal executive undermined the work of governors and mayors and, mirroring the American example, contributed to increase the number of cases and casualties.

As we have previously shown in this [blog](#), the legal basis for responding to the COVID-19 pandemic is the [Act 13.979](#) of 2020. Throughout 2020, the act has been reformed several times, though President Bolsonaro vetoed some of the changes. Parts of the act were subject to judicial review in the Federal Supreme Court. Generally, the act recognizes the federal dimension of the 1988 Constitution provisions on the protection of health.

Governors and mayors had to produce their own regulations following the federal legislative model. The Federal Supreme Court, when adjudicating cases on the president's competence to define essential activities that could not be halted during the pandemic ([ADI 6.341](#)), criticized the inaction of the federal government, which can undermine state and local measures aiming at the protection of their citizens. On the court's judgment, the federal legislation produced by National Congress cannot reduce the power of the states and municipalities to provide health services. Despite recognizing that the federal authority has coordinating powers on these matters, the Federal Supreme Court preserved the competences of governors and mayors. Afterwards, the National Congress modified the Act 13.979 (via [Act 14.035 of 2020](#)) to, again, reinforce the federal character of the protection of health in Brazil.

The relationship between state branches in those cases demonstrates how the COVID-19 pandemic required immediate responses that the executive authority refused to present. The action of states, municipalities and other branches of the federal government worked to curb the federal government's lethal politics, although more could have been done for holding federal authorities accountable for their acts. In the following sections, we attempt to demonstrate how Brazilian institutions reacted to President Bolsonaro's irresponsible approach to COVID-19. The critical tone adopted here points out that more could be done to avoid the high death and contamination toll.

Brazilian Executive and the Pandemic

2020's global fight against COVID-19 pandemic was marked by both Donald Trump and Jair Bolsonaro's sceptical and confusing views on the existence, seriousness and responses to the pandemic. Although some theoretical work has already been done to understand their policies as deliberate omission – [executive underreach](#) – more can be said about the contradictory ways by which the pandemic was politically confronted. The Brazilian president has called the COVID-19 disease a 'little flu', engaged on several occasions in meetings and [public manifestations](#) that disregarded social distance measures (including several ones attacking [Brazilian institutions](#), such as the National Congress and the Federal Supreme Court), shrugged off the [death toll](#), spent [significant amounts of money producing ineffective drugs](#), such as chloroquine, to treat the disease without scientific evidence, raised doubts against and criticized the use of [vaccines](#), and lead to an [unnecessary confrontation](#) with governors about the best moment to start a vaccination program. In the end of 2020, the federal government still lacked an adequate plan for buying, distributing and inoculating vaccines throughout the huge Brazilian territory.

Three factors must be considered when analysing the Brazilian federal government's approach to COVID-19. The first factor is the irrationality of Bolsonarism, the political movement that brings together Bolsonaro's supporters. Given the lack of any rational constraints on their action and judgments, Bolsonarists feel free to engage passionately with the president's pronouncements. Bolsonaro's extremely radical views find resonance all over the country because of their emotional appeal. They are generally associated with guns, death, and certain abhorrent passions which bring together people with different worldviews but a shared scepticism about reason and a similar authoritarian mindset. According to a Brazilian political [analyst](#), there would be only Bolsonarists (Bolsonaro's supporters), instead of a consistent set of ideas called Bolsonarism. Nonetheless, a common background is that Bolsonaro's supporters hold extremely individualistic views about political morality and have very little sense of shared or political responsibility. When faced with President Bolsonaro's coronavirus denial, they regard themselves as "free" or "liberated" to pursue their own individualistic agendas without the burden of judging what is best for the polity or restraining their action for a common good. In other words, by defying science and denying the efficacy of vaccines, lockdowns, and the like, or offering easy exits for the pandemic, President Bolsonaro discharges his followers of several burdens and responsibilities that might impose rational constraints on their unregulated whim. He promises his followers unrestricted freedom and allows them to blame others (who illegitimately purport to restrict this freedom) for the economic consequences of the disease. Pragmatically, the president's strategy has led Bolsonarists to act in a coordinated way and has managed to keep the presidential support in the range of 30% of the Brazilian population.

The second salient factor that must be considered when analyzing the executive branch's approach to the pandemic is the engagement of military personnel in his government. After dismissing two civilian health ministers that adopted a technical approach to the pandemic, the president nominated a military for the office, General Eduardo Pazuello. As Minister for Health, Pazuello showed a canine

fidelity to President Bolsonaro. When Minister Pazuello first attempted to acquire CoronaVac vaccines from the government of the state of São Paulo, Bolsonaro ordered the [suspension of the purchase](#), on ideological grounds. While the official justification for this measure was based on the absence of sufficient tests, the unofficial rhetoric, widely disclosed in Bolsonarist social networks and reinforced by some of Bolsonaro's statements, is that any Chinese vaccine should be rejected as a suspicious medicine. In effect, Bolsonarism's ideological battle against an imaginary global communist threat led to a paralysis in the adoption of a national immunization plan. In mid-January 2021, while the first draft of this post was written, there was still no concrete plan for acquisition and distribution of vaccines in a large scale. States such as São Paulo kept on pressing the federal authorities to accelerate the procedures in the Sanitary Surveillance National Agency (*ANVISA – Agência Nacional de Vigilância Sanitária*), also commanded by a military officer.

On January 17th, however, President Bolsonaro suffered an important defeat: the Agency formally authorized the emergency use of the 7 million doses of the Chinese vaccine. The Governor of the state of São Paulo, João Dória, began the immunization programme in the state just a few minutes after this measure. The vaccination campaign began immediately and Bolsonaro's coronavirus-denial discourse suffered a significant retreat. It is hard to measure, however, the actual impact of this fact in Bolsonaro's anti-scientific crusade.

The relationship between the armed forces and the presidency is still a major problem for Brazilian constitutionalism. Bolsonaro's government reveals that, in addition to legitimacy issues, technical incompetence is a hallmark of the Brazilian military personnel. That is a bigger problem if one considers that not only the federal armed forces, but also state military policemen generally support the president and its authoritarian moves.

The third factor that should be considered when discussing the executive politics on the pandemic is related to the first one. Bolsonaro adopted a clearly contradictory approach to the pandemic. While he often refuses to admit the gravity of the disease and its capacity to infect, at other times he adopts risky solutions aiming at potential political gains. His decision to supporting chloroquine is an example. Despite the absence of scientific [evidence](#) of its efficacy against the virus, Bolsonaro replicated Trump's anti-scientific rhetoric.

His radical rhetoric suffers from a wide range of contradictions, which can be easily identified. If COVID-19 is only a 'small flu', why care about a treatment without evidence of efficacy? By the same token, the president took a stand against obligatory vaccination, at the same time that announced that a [national plan](#) for the vaccines was almost ready in the end of December 2020.

All of these factors give a glimpse of the chaotic Brazilian federal politics towards COVID-19.

Legislative and Judicial Responses to the Federal Chaos

The National Congress has taken a different approach towards COVID-19. The creation of a national financial aid was approved in opposition to Bolsonaro's original proposal for a significantly lower aid. In addition, Bolsonaro tried to veto the mandatory use of masks in public spaces such as commercial and industrial instalments, religious temples and schools. He also intended that companies would not be obligated to supply masks for their employees. The National Congress [overturned](#) the vetoes, as it did in several other circumstances during Bolsonaro's government.

The Federal Supreme Court played a pivotal role to secure the constitutional legitimacy of the measures against COVID-19 – the case law was published in [English](#). The court restricted police raids in Rio de Janeiro's [shantytowns](#) during the pandemic. It reinforced the constitutional protection of [indigenous people](#) by demanding that the federal government offered adequate health policies concerning the pandemic. The structural decision ordered the federal government to present a plan for protecting the indigenous populations – at least twice, the Justice rapporteur, Roberto Barroso, rejected the plans presented by Bolsonaro's government. Based on the constitutional right to [access to information](#), the Federal Supreme Court struck down provisions that restricted the publicization of COVID-19 governmental data. The court demanded that public servants obey to [scientific and technical criteria](#) when applying measures that envisioned the control of the pandemic. It allowed the states and municipalities to rely on technical and scientific data obtained by them to base their health measures, and not only those collected by the central government. The same federal principle allowed that states and municipalities restricted the circulation of people to avoid the virus' spread.

In other important cases, the Federal Supreme Court (i) prevented the central government from requesting [ventilators](#) bought by a state, (ii) rejected a claim that [provisional measures](#) (that is, executive decrees with statutory force issued by the president) could have their validity indefinitely extended during the pandemic, and (iii) ruled that federal and state governments can impose restrictive measures (alternative to the [enforced vaccination](#)) on those who refuse to take vaccines against COVID-19. The court authorized, for instance, limitations on transportation or prohibitions of access to certain public places.

There were, however, certain problematic rulings and controversial measures adopted by Brazilian courts and judges. The Federal Supreme Court sustained a provision that authorized hour reduction and salary cut without [trade union's](#) authorization – a decision that goes against the text of the 1988 Constitution. The court was fiercely criticized, in addition, when it requested certain research foundations to give priority to judges and public servants in the distribution of vaccines.

Brazilian Federal System and COVID-19 Politics

The 1988 Constitution designed a system for the protection of health based on shared powers and cooperative action among the federal entities. As it was mentioned before, federal executive's inaction led to more participation of the states and the municipalities. Instead of the central government assuming a role of coordination of health politics, we observed a conflict in the federal system, which led to several cases being brought to the Federal Supreme Court – which, in those cases, responded quickly and with a rational basis. The court, following provisions of the Act 13.979 of 2020, allowed that states and municipalities use their vaccines in cases of omission of the central government. Additionally, in case there is no authorization of the Sanitary Surveillance National Agency, those federal entities could initiate a vaccination campaign based on [foreign registrations](#).

Right from the start of the pandemic, almost all states signed a public letter requesting a proper response by the federal government. That was not a sufficient step and most of the conflicts gained political dimension when they should not – consider the debate on the efficacy of the Chinese vaccine. The Federal Supreme Court was provoked and federal matters became judicialized.

Human Rights and Civil Liberties

The right to health and personal integrity was deliberately attacked by the omissions of the federal government. Although Bolsonaro still remains popular in some segments of the Brazilian society, his accountability for the high death and infection tolls should be considered by the National Congress. With this scenario in mind, the president approached traditional parties in order to gain their sympathy and avoid future impeachment processes. On the international level, Bolsonaro's harmful approach against the indigenous people was brought to the [International Criminal Court](#) with few chances to thrive – however, it can spark an important debate on the reach of the notion of crimes against humanity.

In the domestic level, other rights were violated, such as the right to information concerning the numbers and data related to the pandemic. The Federal Supreme Court was able to neutralize, in a significant measure, the harmful practice of the federal government.

On balancing, Bolsonarists continue to argue that COVID-19 measures disproportionately violate the right to property and the right to free initiative. They therefore resist the shutting of public spaces, bars, restaurants, and so on, to foster social distancing. Courts have generally rejected this view.

2021 Outlook for Brazil

2021 started with new waves of COVID-19 spreading in Brazil. At the same time, Bolsonaro insistent on his familiar exemption of responsibility. Hospitals in the city of Manaus ran out of [oxygen](#) for patients. As several patients died of suffocation,

President Bolsonaro's comments were limited to praise his government for doing their share instead of proposing any concrete solution. In his declarations, one can easily see the individualistic and also lethal Bolsonarist logic.

Brazil has an enormous challenge for the years to come. Bolsonaro's government was efficient to accelerate a process of deterioration of Brazilian constitutional institutions: it captured state accountability agencies, it attacked the press and public universities, it fragilized scientific organs and professionals, and so on. 2020 was also a year in which true coup's attempts were not effective only because of the absence of a genuine support from the armed forces or the resistance of the majority of the population. Considering the COVID-19 pandemic and the federal executive underreach, Bolsonaro's attitudes will surely delay the decreasing of the number of deaths and cases. Although no emergency powers were, until now, invoked, the slow cooking of Brazilian constitutional democracy will require that the National Congress, the Federal Supreme Court and federal prosecutors adopt a much more vigilant approach to contain the federal government. The obstacle, however, is that Bolsonarism can have already infected those institutions. It remains with the democratic society the task to heal Brazilian constitutionalism.

